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IN THE

Supreme Court of the United States

OCTOBER TERM — 1954

No. 145

CARLOS MARCELLO,

Petitioner

versus

EDWARD J. AHRENS,
Officer In Charge
United States Immigration
and Naturalization Service.

(John M. Bonds, Officer in Charge, substituted as Appellee in place and stead of Edward J. Ahrens)

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM — 1954

NO. 154

CARLOS MARCELLO,

Petitioner

versus

EDWARD J. AHRENS,
Officer In Charge
United States Immigration
and Naturalization Service.

(John M. Bonds, Officer in Charge, substituted as Appellee in place and stead of Edward J. Ahrens)

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named petitioner, Carlos Marcello, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, af-

firming a judgment of the United States District Court for the Eastern District of Louisiana discharging a Writ of Habeas Corpus and sustaining the validity of a deportation order issued against petitioner.

Petitioner reiterates all of the matters covered in his original petition filed herein on June 17, 1954.

Because of intervening jurisprudence available to petitioner only after the filing of the original petition herein, there is now filed a supplemental petition and brief under the provisions of Rule 24 (4) of this Court.

QUESTION PRESENTED

Whether the status of petitioner as a non-deportable resident alien both at the time of the enactment of and the effective date of the Immigration and Nationality Act of 1952 (66 Stat 162-283; 8 USC 1101 et seq) was affected by the provisions of that Act, particularly Section 1251 (a) (11) and Section 1251 (d), Title 8 United States Code, 66 Stat 204.

STATUTES INVOLVED.

Act of February 18, 1931, Ch 224, 46 Stat. 1171, read at its enactment as follows:

"Any alien (except an addict who is not a dealer in or peddler of, any of the narcotic drugs mentioned in this Act) who, after February 18, 1931, shall be convicted and sentenced for violation of or con-

spiracy to violate any statute of the United States taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, cocoa leaves, heroin, or any salt, derivitive, or preparation of opium or cocoa leaves, shall be taken into custody and deported in manner provided in Sections 19 and 20 of the Act of February 5, 1917, entitled "An Act to regulate the immigration of aliens to, and the residence of aliens in the United States."

Act June 28, 1940, Public Law No. 670 Ch. 439, Title II, Section 21, 54 Stat. 673, amending Title 8, Section 155 and 156 (a) (now repealed) read in part as follows:

"Sec. 21. The Act entitled 'An Act to provide for the deportation of aliens convicted and sentenced for violation of any law regulating traffic in narcotics' approved February 18, 1931, is amended — (1) By striking out the words "and sentenced"

. . . . . .

(3) By inserting after the word 'heroin' a comma and the word 'marihuana'.

"Sec. 22. No alien shall be deportable by reason of the amendment made by Section 20 or 21 on account of an act committed prior to the date of the enactment of this Act."

Section 155, 8 US Code provided in part:

> "The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this chapter."

Section 403 of the Immigration and Nationality Act of 1952, Paragraph 66 Stat. 279-280, provides in part as follows:

> "(a) The following Acts and all amendments thereto and parts of Acts and all amendments thereto are repealed:
>
> (13) Act of February 5, 1917 (39 Stat. 874)"
>
> (31) Act of February 18, 1931 (46 Stat. 1171, 8 USC 156 (a)"

Section 1251 (a) 11, Title 8, U. S. Code (Section 241 (a) (11), Immigration and Nationality Act of 1952 provides in part as follows:

> "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * *

is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction sustaining opiate;" (66 Stat. 204)

And Paragraph (d) of the same section reads as follows:

"Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act." (66 Stat. 204)

Section 405 (a) (Public Law 414, June 27, 1952) of the Immigration and Nationality Act of 1952, 66 Stat. 280 (Note following Section 1101, 8 United States Code, (Savings Clause) in part reads as follows:

> "Sec. 405 (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, (sic) conditions, rights, acts, things, liabilities, obligations or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect ***"

STATEMENT

The facts relating to the question presented in this supplemental petition are set out at pages 12 and 13 of the original petition.

The contention that petitioner had the status of a nondeportable resident alien at the time of the enactment of

and the effective date of the 1952 Immigration Act was raised before the special inquiry officer (Original Petition, Appendix D, p XLVI), the Board of Immigration Appeals (Original Petition, Appendix B, p. XX, XXI, XXII) and in the petition for a writ of habeas corpus (R 9-10 Par. XIII, XV, XVI, XVII.)

REASON FOR ALLOWANCE OF WRIT

1. The question presented has obvious importance in the administration of the Immigration and Nationality Act of 1952 (8 USC 1101 et seq) which has not been, but should be, settled by this Court.

SUMMARY OF ARGUMENT

Petitioner had the status of a non-deportable resident alien because of the absence of any statutory provisions under which he could be deported until the enactment of the present Immigration Act of 1952 and this status was preserved to him because it was not the intention of Congress to alter that status and because of the Savings Clause of the 1952 Act (Sec. 405 (a) 8 USC 1101 Note 66 Stat 280).

ARGUMENT

Petitioner was convicted on October 29, 1938 on a plea of guilty to an indictment charging a violation of the Marihuana Tax Act of 1937. At the time of his conviction and sentence, petitioner was not a deportable alien, as there was not then in force any law authorizing his deportation because of such conviction.

When the word "marihuana" was added to the Act of February 18, 1931, 46 Stat. 1171, by Section 21 of the Act of June 28, 1940, 54 Stat. 673, specific provision was made in Section 22 of the 1940 Act that no alien should be deportable by reason of such amendment for any act committed prior thereto. Thus petitioner had the status of a non-deportable resident alien on the enactment of the 1952 Immigration Act June 27, 1952 and upon its effective date, December 24, 1952.

Petitioner, therefore, for a long period of time, conducted himself in the light of that status. He engaged in business and raised a family of four in this country. His reliance on that status was reinforced by the fact that his deportation status during these years was the subject of several investigations by the Immigration Service all with the result, publicly announced in the press, that petitioner was not subject to deportation.

It is, therefore, apparent that over a long period of years, it was not the policy of Congress to make the grounds for deportation of an alien operate retrospectively. It was only upon the general revision of immigration laws by the present Act that such an interpretation was placed upon grounds for deportation occuring prior to the passage of the Act of 1952. And, it is our contention that it was not the intention of Congress to deport a resident alien having the status enjoyed by petitioner.

Section 1251 (a) (11), Title 8, U. S. Code 66 Stat. 204 (Section 241 (a) (11), Immigration and Nationality Act of 1952 provides in part as follows:

"Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * *

Is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation . . . of . . . marihuana . . . "

And Paragraph (d) of the same section reads as follows:

"Except as otherwise specifically provided in this section, the provision of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act." (66 Stat. 204)

There is no doubt that to apply to petitioner the above sections must have a retroactive effect.

It is our contention that because of the absence of any statutory provisions under which petitioner could be deported until the enactment of the present Act that petitioner had the status of a non-deportable resident alien and this status was preserved to him by reason of the Savings Clause of the 1952 Act (Sec. 405 (a), 8 U.S.C. 1101 note).

This Court, in the consideration of petitioner's contention, must bear in mind that the 1952 Act effects a complete revision of the immigration and nationality laws of the nation. Congress certainly was aware that in such a complete revision of the law, there would inevitably be serious, harsh and unforeseen effects upon preexisting statuses and conditions. It may well be that Congress never contemplated the result here reached.

The question of the status of aliens who were convicted and sentenced for violation of laws relating to narcotics, but were saved from deportation by the recommendations of the sentencing judge (See 8 U.S.C. Sec. 155) have already been decided favorably to the aliens in two cases. These cases are *U. S. ex rel De Luca v. O'Rourke*, No. 14, 995, 8th Circuit, decided June 17, 1954, rehearing denied July 14, 1954 and *Ex Parte Robles-Rubio* (1954) D. C. Calif., 119 F. Supp. 610. In these cases, it was decided that as the judicial recommendations were valid when made, they continue to relieve the alien from deportation by virtue of the saving clause (405 (a) of the 1952 Act.)

The reasoning of these cases and their applicability to the instant case will be fully discussed hereafter. However, at this time, we will discuss a question that will at once

arise in the minds of the Court. It will be thought and undoubtedly argued that the cited cases are not applicable because of the judicial recommendations which are not here present. However, we must remember that the aliens in both cases were deportable because of their convictions. Petitioner was not deportable because of the absence of statutory authority to deport. Even after the enactment of the Act of Congress of June 28, 1940 he was not deportable. Petitioner was never in the position where he could appeal to a competent court for a recommendation of no deportation. There was no court to grant him this relief. The law does not require a person to do a vain and useless thing. In this situation can it be said that there is a difference in the status of petitioner and the aliens in the above cases? It might be argued that if it were held there was a difference, then the interpretation of Section 1251 (a) (11) of the Act of 1952 is so discriminatory against petitioner as to be lacking in due process under the Fifth Amendment.

However, what must be determined here is the effect of the new statute upon the status of aliens, who have heretofore been not judicially, but legislatively, saved from deportation in narcotic cases. As was said in *Ex Parte Robles-Rubio*, 119 F. Supp. 610, 613:

> "The *power* of Congress to alter their status and subject them now to deportation is unquestionable. See *United States ex rel Barile v. Murff*, D. C. Md. 1953 116 F. Supp. 163. But, it is the *intent* of Congress in this regard, which we must endeavor to ascertain."

Strange as it seems the question of the retroactive effect of Sections 1251 (a) (11) and 1251 (d) were not extensively discussed in the debates and in the reports on the Act. The House Report says:

> "*Grounds for deportation* relating to aliens convicted of certain offenses set forth in the Act of June 28, 1940 (54 Stat. 673) . . . *are continued in the bill.*" (Emphasis supplied) (1952 Cong. Service Vol. 2 p. 1715)

The language of the house report is important. "Grounds for deportation . . . set forth in the Act of June 28, 1940 (54 Stat. 673) are continued in the bill." This language does not signify any intention by Congress to revoke the status of petitioner, who was non-deportable by the Act of 1940. On the contrary, the exemption of petitioner was recognized when the 1940 Act grounds for deportation "were continued in the bill."

Neither does the language of the co-sponsor of the bill, Representative Walter, where he stated in answer to the objection of the C.I.O. to creating and making retroactive new grounds for deportation thus jeopardizing the status of resident foreign born:

> "*Of course H. R. 5678 does not do that.* The Internal Security Act does and the Internal Security Act is part of the law of the land today. It is restated, that is true, in this bill. That is because we are trying to put together for the first time since 1802 all the statutes relating to immigration and naturalization."

> "It does, however, cover the situation where an alien succeeds in hiding in the United States . . . As those of you who have practiced law know, the statute of limitation does not run when a person hides. The statute is tolled. We carry that philosophy into the statute." (98 Cong. Record (Per. Ed. 1 4301-2)) (Emphasis supplied)

This statement by a legislator of vast experience in immigration matters shows no intent to alter the status of appellant. Petitioner was not a Communist dealt with by the Internal Security Act, nor is there the slightest suggestion that he was an alien "hiding in the United States." On the contrary, he lived openly and publicly, and the record shows that the immigration service had full knowledge not only of his whereabouts but of his comings and goings. "It might well be that the Congress never contemplated this result." *Robles-Rubio*, supra.

It is the accepted principal of law that laws regulating human action are to operate prospectively unless clearly provided otherwise.

In enunciating this principle, Chief Justice Marshall, speaking for the Court, in *Reynolds v. McArthur*, 2 Pet. 417, 434, said:

> " . . . It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated, look forward, not backward; and are never to be construed retrospectively unless the language of the Act shall render such construction indispensable. No words are

found in the Act of 1818 which render this odious construction indispensable."

And, in *Cameron v. United States*, 231 U. S. 710, 720, it was said:

"... A retroactive operation of statutes is not to be given except in clear cases, unequivocably evidencing the legislative intent to that effect."

The broad and comprehensive clause embodied in the 1952 Act, Sec. 405 (a) 66 Stat. 280, 8 U.S.C. 1101 note, reads, as far as pertinent as follows:

"(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of ... ; or to affect any prosecution, suit, action or proceedings, civil or criminal, brought, or any *status*, condition, right in process of acquisition, *act*, thing, liability, obligation, matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, *statutes (statuses?)*, conditions, rights, acts, things, liabilities, obligations, or matters, the statutes, or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in full force and effect." (Emphasis supplied)

This so-called savings clause has been adjudged to be "broad and comprehensive" in *Yanish v. Barber* (1954) 9th Cir. 211 F. (2d) 467, 470, and is further referred to "as a

measure of policy and precaution" and "for this purpose to have continued in force the statutes or parts thereof under which such status, obligation, liability or right became fixed or determined."

Judge Goodman of the District Court (Calif.) in *Ex Parte Robles-Rubio*, 119 F. Supp. 610, at page 613, gives an able and scholarly interpretation of the savings clause and its effect. He states:

> "The saving clause in the 1952 Act is one of unusual breadth as is appropriate in a statute which effects a complete revision of the immigration and nationality laws of the nation. *The breadth of the savings clause is indicative of the Congressional awareness that the 1952 Act would inevitably have unforeseen effects upon pre-existing statuses and conditions, and the Congressional desire to avoid such effects as far as possible* . . . In my opinion, this provision was designated to meet just such a situation as is presented here." (Emphasis supplied)

This language of Judge Goodman applies with equal force to the case of petitioner.

In the opinion in the DeLuca case, (set forth in the appendix) decided June 17, 1954, rehearing denied, in discussing the status of an alien saved from deportation on a narcotic conviction by judicial recommendation, Judge Sanborn, as organ of the Court, said:

> "To increase the uncertainty as to whether Congress intended to deprive an alien such as DeLuca

> of the benefit of the recommendations of the sentencing court, we have the so-called savings clause, Section 405 (a) of the Act, 66 Stat. 280 (Note following Section 1101, 8 U.S.C., 1952 Ed. page 734) . . . "

The Court in that case stated it could be argued that by putting aliens convicted of narcotic law violations in a distinct class, Congress intended to deprive all aliens eligible to and who had received judicial recommendations of no deportation, of their non-deportable status. On the other hand, if could be argued that DeLuca came within Section 241 (a) (4) of the Act as to whom the recommendations of no deportation would still be effective. The Court then further held this uncertainty was increased by the broad and comprehensive savings clause of the 1952 Act.

This reasoning likewise applies to the case of the petitioner. It can be argued under a strict and literal interpretation of Section 1251 (a) (11) that petitioner can be deported because of his long-ago conviction in 1938, that his status acquired under the Act of Congress of June 28, 1940 is to be ruthlessly pushed aside and petitioner uprooted from his home, his family and means of livelihood.

It can likewise be contended in view of the House Report that "Grounds for deportation" contained in the 1940 Act "are continued in the bill" means just that, and that the non-deportable status of petitioner granted in the 1940 Act continues in full force and effect. This is particularly true in view of the comprehensive savings clause of the 1952 Act and the logical interpretation placed by Judge Goodman on such clause.

We submit that the conclusion reached by the Court of Appeals for the Eighth Circuit in the *DeLuca* case, supra, is also applicable here. This conclusion was:

> "The record indicates that, since his convictions, De Luca has been a law-abiding resident alien. The disastrous consequences of deportation to him would be so far out of proportion to any benefit the United States could seemingly derive from his removal from the country as to entitle him to have *any reasonable doubts as to his deportability resolved in his favor.* Cf. *Fong Haw Tan v. Phelan*, 333 U. S. 6, 10. It seems apparent that the controlling question in this case can be put at rest only by the Supreme Court or by an amendment to the Act. We feel justified in ruling that there is no clear-cut authority for depriving DeLuca of the status of a non deportable alien . . . " (Emphasis supplied.)

We submit that the broad and comprehensive provisions of the savings clause of the 1952 Act were "designed to meet just such a situation as is presented here." Furthermore, in the language of the DeLuca case, supra, "it seems apparent that the controlling question . . . can be put at rest only by the Supreme Court . . . "

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the application for a Writ of Certiorari should be granted.

WHEREFORE, your petitioner prays that a writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Court of Appeals had in this cause, to the end that the cause may be reviewed and determined by this Court; that the judgment of said Court of Appeals be reversed; and that the petitioner may be granted such other and further relief as to this Court may seem proper.

Dated August _____, 1954

Carlos Marcello
Petitioner

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Of Counsel.

CERTIFICATE

I certify that copies of the foregoing brief have been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto.

APPENDIX

United States Court of Appeals
For The Eighth Circuit

No. 14,995.

United States ex rel, Giuseppe
(Joseph) DeLuca,
Appellant,

vs.

J. L. O'Rourke, District Director, Immigration and
Naturalization Service, Justice Department,
Appellee.

(June 17, 1954.)

Appeal from the United States District Court for the
Western District of Missouri.

R. T. Brewster (Hunt C. Moore was with him on the brief), for Appellant.

Horace Warren Kimbrell, Assistant United States Attorney (Edward L. Scheufler, United States Attorney, and William O. Russell, Assistant United States Attorney, were with him on the brief), for Appellee.

Before SANBORN, JOHNSEN and COLLET, Circuit Judges.

SANBORN, Circuit Judge.

Giuseppe (Joseph) DeLuca, an alien in custody under a warrant for deportation issued October 15, 1953, by the Acting District Director, Kansas City District, Immigration and Naturalization Service, Department of Justice, petitioned the District Court for release on habeas corpus. The court issued an order to show cause directed to the respondent, J. L. O'Rourke, District Director, United States Immigration and Naturalization Service, Department of Justice, (appellee). After his response to the order and after a hearing, the court denied and dismissed the petition. DeLuca has appealed.

The order for the deportation of DeLuca, in so far as it was sustained by the Board of Immigration Appeals, was based upon findings of the Special Inquiry Officer of the Immigration and Naturalization Service who conducted the deportation hearing, that DeLuca was an alien who had twice been convicted and sentenced for violating the law relating to the importation and sale of narcotic drugs and who was therefore subject to deportation under Section 241 (a) (11) of the Immigration and Nationality Act, 66 Stat. 163 et seq., effective December 24, 1952, 8 U.S.C., 1952 Ed., §1251 (a) (11). Section 241 (a) (11) provides as follows:

"(a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—

* * * * *

"(11) is, or hereafter at any time after entry has been a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate."

DeLuca, a sixty-year old alien, had first come to the United States in 1910 from Italy, where he was born, and had last entered the United States in 1934 from Italy as a returning resident. Two judgments of conviction were entered against him on March 27, 1943, in the United States District Court for the Western District of Missouri, one based upon the verdict of a jury finding him guilty under an indictment, based on 21 U.S.C. (1940 Ed.) §174, the "Narcotic Drugs Import and Export Act", charging him and others with the concealment of narcotic drugs, knowing them to have been imported unlawfully into the United States; the other conviction based on his plea of guilty to an indictment under the same statute,[1] charging him and

---

[1]The judgment imposed under the second indictment bore the caption "Criminal indictment in one count for violation of U.S.C., Title 26, Sec. 2553." This was a mistake, since the crime charged in the indictment and described in the judgment was clearly under Section 174 of Title 21 U.S.C.

others with the sale of narcotic drugs, knowing them to have been unlawfully imported into the United States. The District Court sentenced DeLuca to three years imprisonment for each offense, the sentences to be served concurrently.

DeLuca admitted that he was an alien who had been convicted of violations of law relating to the illicit traffic in narcotic drugs. One of his main contentions in the District Court in the habeas corpus proceedings was that, under an agreement with the United States Attorney whereby DeLuca was to forego an appeal from the judgment of conviction entered upon the jury verdict under the first indictment and was to enter a plea of guilty to the second indictment, in consideration of the United States Attorney recommending to the court that DeLuca be given a certain sentence and that the court recommend to the Attorney General that DeLuca be not deported, he had, in effect, acquired the status of a nondeportable alien, the court having accepted the recommendations of the United States Attorney and having recommended to the Attorney General in each of the cases that DeLuca be not deported. DeLuca also contended that to give Section 241 (a) (11) of the Immigration and Nationality Act of 1952 a retrospective effect would be violative of his constitutional rights.

Judge Reeves, who sentenced DeLuca and who also entered the order from which he has now appealed, made timely recommendations, in conformity with Section 155(a) of Title 8 U.S.C. (1940 Ed.), to the Attorney General that DeLuca be not deported because of his convictions upon charges of having violated Section 174 of Title 21 U.S.C. (1940 Ed.).

At the time Judge Reeves, in 1943, imposed sentences upon DeLuca, Section 155(a) of Title 8, U.S.C., 1940 Ed., provided as follows:

"(a) * * * The provisions of this section respecting the deportation of aliens convicted of a crime *involving moral turpitude* shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this chapter; * * * ."

Section 175 of Title 21 U.S.C., 1940 Ed., provided:

"§175. Any alien who at any time after his entry is convicted under section 174 of this title shall upon the termination of the imprisonment imposed by the court upon such conviction and upon warrant issued by the Secretary of Labor be taken into custody and deported in accordance with the provisions of sections 155 and 156 of Title 8 or provisions of law hereafter enacted which are amendatory of or in substitution for such sections."

In the habeas corpus proceeding, Judge Reeves reached the conclusion that his recommendations to the Attorney General that DeLuca be not deported were unauthorized and ineffective because the crimes of which DeLuca was convicted were not crimes involving moral turpitude. But the Judge's recommendations were presumptively valid and there is nothing in the record to show that the crimes

were not of such a character as to involve moral turpitude. We note that in the decision of the Board of Immigration Appeals in this case the following statement appears: "It is conceded that prior to the Immigration and Nationality Act an alien convicted of the offenses in question thereby became deportable, but that a recommendation against deportation was effective to prevent deportation."

While it is no doubt true that there may be technical, inadvertent and insignificant violations of the laws relating to narcotics, which do not involve moral turpitude, there can be nothing more depraved or morally indefensible than conscious participation in the illicit drug traffic. The evils which result from unlawfully importing or dealing with unlawfully imported narcotic drugs are a matter of common knowledge. Even the federal laws relating to the domestic traffic in narcotic drugs, which were sustained as revenue measures, were recognized as having a moral purpose as well as that of raising revenue. *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 402; *United States* v. *Doremus*, 249 U.S. 86, 94. In *United States v. Balint*, 258 U.S. 250, 253, the court said: "The Narcotic Act has been held by this court to be a taxing act with the incidental purpose of minimizing the spread of addiction to the use of poisonous and demoralizing drugs."

In *Jordan v. De George*, 341 U.S. 223, 232, it was held that all crimes in which fraud is an ingredient are crimes involving moral turpitude, and that a conspiracy to defraud the United States of taxes on distilled spirits was such a crime within the meaning of §19(a) of the Immigration Act of 1917, 39 Stat. 889, as amended, 8 U.S.C., 1940 Ed., §155(a), and required the deportation of an alien sentenced

more than once to imprisonment for one year or more because of conviction for crime involving moral turpitude. The crime of dealing with narcotic drugs known to have been smuggled into the United States is certainly no less reprehensible and probably no less a fraud upon the revenues than the offenses involved in the *Jordan* case.

The following cases support the view that, prior to the Immigration and Nationality Act of 1952, the recommendation of a sentencing judge against the deportation of an alien convicted of a violation of the law relating to the illicit traffic in narcotics, such as the violations here involved, was effective to prevent deportation. *Dang Nam* v. *Bryan*, 9 Cir., 74 F. 2d 379, 380-381; *Ex parte Eng*, D.C. N.D. Cal., 77 F. Supp. 74, 77.

It is our opinion that, because of the timely recommendations of Judge Reeves to the Attorney General that DeLuca be not deported because of his convictions in 1943, he was not, prior to the effective date of the Immigration and Nationality Act of 1952, subject to deportation because of such convictions. We do not agree, however, that the recommendations of the United States Attorney to the District Judge and the District Judge's recommendations to the Attorney General, under the circumstances disclosed by the record, constituted a binding contract between the United States and DeLuca that he should never be deported because of the convictions. As an alien, DeLuca could not acquire a right to permanent residence in the United States which Congress was bound to respect, nor could the United States Attorney or the District Judge impair the power of Congress to provide for the deportation of aliens whom it considered undesirable.

Judge Learned Hand, speaking for the United States Court of Appeals for the Second Circuit, in *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 490, said:

"The interest which an alien has in continued residence in this country is protected only so far as Congress may choose to protect it; Congress may direct that all shall go back, or that some shall go back and some may stay; and it may distinguish between the two by such tests as it thinks appropriate."

Aliens, so long as they are permitted to remain in the United States, are entitled to the protection of its Constitution and laws with respect to their rights of person and of property and to their civil and criminal responsibility. "But they continue to be aliens, * * * and therefore remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest." *Fong Yue Ting* v. *United States*, 149 U.S. 698, 724.

Legislation providing for the deportation of aliens is not invalid because retrospective in operation. *Mahler* v. *Eby*, 264 U.S. 32; *United States ex rel. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521, 529; *Harisiades* v. *Shaunghnessy*, 342 U. S. 580, 594-595; *Galvan v. Press*, . . . U. S. , decided May 24, 1954; *United States ex rel. Barile* v. *Murff*, D.C. Md., 116 F. Supp. 163.

We find no merit in DeLuca's contention that he did not have a fair hearing before the Special Inquiry Officer because DeLuca's case was added to the Attorney General's

deportation list of cases to be given priority for treatment. It requires a substantial showing of bias to disqualify a hearing officer in administrative proceedings or to justify a ruling that the hearing was unfair. Compare *Donnelly Garment Co.* v. *National Labor Relations Board*, 8 Cir., 151 F. 2d 854, 870-873, with *National Labor Relations Board* v. *Donnelly Garment Co.*, 335 U.S. 219, 236-2[illegible]. Moreover, there was no dispute as to the facts in DeLuca's case. The only issues were those of law which have been considered not only by the Special Inquiry Officer but by the Board of Immigration Appeals and the District Court. Cf. *United States ex rel. Marcello v. Ahrens*, D.C. E.D. La., 113 F. Supp. 22, 24.

The difficulty we have with this case is in spelling out any clear-cut authorization for the deportation of an alien such as DeLuca who was convicted of crimes involving moral turpitude but was saved from deportation because of the recommendations of the sentencing judge. Section 175 of Title 21 U.S.C., 1940 Edition, (hereinbefore quoted) indicated that Congress considered violations of Section 174 of that Title as crimes involving moral turpitude, since §175 made aliens convicted on narcotic charges under §174 deportable "in accordance with the provisions of sections 155 and 156 of Title 8 * * *," and since §155 related to deportation of aliens convicted of crimes involving moral turpitude, and §156 related to the manner of their deportation.

Whether Section 241(a) of the Immigration and Nationality Act of 1952, §1251(a) of Title 8 U.S.C., 1952 Ed., changed the status of DeLuca from a nondeportable alien to a deportable alien, we think is not clear. His status prior

to the Act was that of an alien convicted and sentenced for crimes involving moral turpitude, but not subject to deportation because of the recommendations of the sentencing judge. Section 241(a) (4) of the Act, §1251(a)(4) of Title 8 U.S.C., 1952 Ed., provides for the deportation of an alien who

"is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial."

Section 241(a)(4) of the Act does not expressly exclude an alien convicted and sentenced for a crime involving moral turpitude which is also a violation of a law relating to the illicit traffic in narcotic drugs, and Section 241(b) of the Act, §1251(b) of Title 8 U.S.C., 1952 Ed., provides that Section 241(a)(4) shall not apply if the sentencing court shall make a timely recommendation to the Attorney General that the alien be not deported.

It is true that Section 241(b) of the Act does not expressly authorize such recommendations with respect to an alien who at any time after entry has been a "narcotic drug addict, or who at any time has been convicted of any law or regulation relating to the illicit traffic in narcotic drugs." Section 241(a)(11) of the Act, §1251(a)(11) of Title 8, U.S.C., 1952 Ed.

It can be argued that by putting aliens who were drug addicts or were convicted of violations of the narcotic laws in a class distinct from those who were convicted and sentenced for crimes "involving moral turpitude", Congress intended to deprive aliens who prior to the effective date of the Act had been convicted of violations of narcotic laws but were nondeportable because of the recommendations of the sentencing judge, of their nondeportable status and to invalidate all such recommendations so far as narcotic convictions were concerned.

On the other hand, it can be argued that DeLuca was an alien who came within Section 241(a)(4) of the Act, as to whom the recommendations of no deportation would still be effective notwithstanding the provisions of Section 241 (a) (11).

To increase the uncertainty as to whether Congress intended to deprive an alien such as DeLuca of the benefit of the recommendations of the sentencing court, we have the so-called savings clause, Section 405(a) of the Act, 66 Stat. 280 (Note following §1101, 8 U.S.C., 1952 Ed., page 734), which, so far as pertinent, reads as follows:

"Sec. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or *other document* or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceed-

ings, civil or criminal, brought, or *any status*, condition, right in process of acquisition, *act*, thing, liability, obligation, or matter, civil or criminal, *done or existing*, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, *acts*, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect." (Italics supplied.)

We question whether it is specifically provided in the Act that an alien convicted upon a narcotic charge involving moral turpitude, who the sentencing judge recommended should not be deported, should, nevertheless, be deported because of his conviction. Unless there is such a specific provision, it would seem that the savings clause is broad enough to preserve the efficacy of the recommendation of the sentencing judge and to prevent the deportation of the alien because of the conviction.

The record indicates that, since his convictions, DeLuca has been a law-abiding resident alien. The disastrous consequences of deportation to him would be so far out of proportion to any benefit the United States could seemingly derive from his removal from the country as to entitle him to have any reasonable doubts as to his deportability resolved in his favor. Cf. *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10. It seems apparent that the controlling question in this case can be put at rest only by the Supreme Court or by an amendment to the Act. We feel justified in ruling that there is no clear-cut authority in the Act for depriving DeLuca of the status of a nondeportable alien resulting from the

recommendations of the sentencing judge that he be not deported.

The judgment appealed from is reversed and the case is remanded with directions to discharge DeLuca from custody under the order and warrant for deportation.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.